

TRAINING AMERICA'S STRATEGIC CORPORALS

BY

LIEUTENANT COLONEL DAVID G. BOLGIANO
Maryland Air National Guard

DISTRIBUTION STATEMENT A:

Approved for Public Release.
Distribution is Unlimited.

USAWC CLASS OF 2009

This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.



U.S. Army War College, Carlisle Barracks, PA 17013-5050

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 30 MAR 2009		2. REPORT TYPE		3. DATES COVERED	
4. TITLE AND SUBTITLE Training America's Strategic Corporals				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) David Bolgiano				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army War College ,122 Forbes Ave.,Carlisle,PA,17013-5220				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited.					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT see attached					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 28	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

The U.S. Army War College is accredited by the Commission on Higher Education of the Middle State Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

REPORT DOCUMENTATION PAGE				Form Approved OMB No. 0704-0188	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.					
1. REPORT DATE (DD-MM-YYYY) 12/12/2008		2. REPORT TYPE Strategy Research Project		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE Training America's Strategic Corporals				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) Lieutenant Colonel David G. Bolgiano				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Colonel John P. Cummings Department of Command, Leadership, and Management (DCLM)				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) U.S. Army War College 122 Forbes Avenue Carlisle, PA 17013				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION / AVAILABILITY STATEMENT Distribution A: Unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT In the asymmetric environment – from traditional peacekeeping to counter-insurgency (COIN) – American service members are thrust into situations where they must make use of deadly force decisions that are analogous to civilian law enforcement operations. Despite mandatory guidance from the Chairman, Joint Chiefs of Staff that “commanders, at all levels, shall ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense”, the dangerous, and sometimes tragic, reality is that the Services are not fulfilling this mandate. This creates a heightened risk for friendly forces and a greater likelihood of legally inappropriate uses of force that might undermine strategic successes. This article proposes that U.S. Joint Forces Command develop, manage and sustain a use of deadly force instructor certification program that would ensure joint standards for master trainers from the diverse services on well-defined yet routinely ignored universal truths concerning not only the law, but also the tactical realities surrounding deadly force encounters. America’s “Strategic Corporals” trained to the right legal and tactical standard will more likely win and survive in today’s deadly force encounters.					
15. SUBJECT TERMS Use of Deadly Force, Asymmetric Decision Making					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT UNLIMITED	18. NUMBER OF PAGES 28	19a. NAME OF RESPONSIBLE PERSON
a. REPORT UNCLASSIFIED	b. ABSTRACT UNCLASSIFIED	c. THIS PAGE UNCLASSIFIED			19b. TELEPHONE NUMBER (include area code)

USAWC STRATEGY RESEARCH PROJECT

TRAINING AMERICA'S STRATEGIC CORPORALS

by

Lieutenant Colonel David G. Bolgiano
Maryland Air National Guard

Colonel John P. Cummings
Project Adviser

This SRP is submitted in partial fulfillment of the requirements of the Master of Strategic Studies Degree. The U.S. Army War College is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, 3624 Market Street, Philadelphia, PA 19104, (215) 662-5606. The Commission on Higher Education is an institutional accrediting agency recognized by the U.S. Secretary of Education and the Council for Higher Education Accreditation.

The views expressed in this student academic research paper are those of the author and do not reflect the official policy or position of the Department of the Army, Department of Defense, or the U.S. Government.

U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

ABSTRACT

AUTHOR: Lieutenant Colonel David G. Bolgiano
TITLE: Training America's Strategic Corporals
FORMAT: Strategy Research Project
DATE: 10 December 2008 WORD COUNT: 5851 PAGES: 28
KEY TERMS: Use of Deadly Force, Asymmetric Decision Making
CLASSIFICATION: Unclassified

In the asymmetric environment – from traditional peacekeeping to counter-insurgency (COIN) – American service members are thrust into situations where they must make use of deadly force decisions that are analogous to civilian law enforcement operations. Despite mandatory guidance from the Chairman, Joint Chiefs of Staff that “commanders, at all levels, shall ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense”¹, the dangerous, and sometimes tragic, reality is that the Services are not fulfilling this mandate. This creates a heightened risk for friendly forces and a greater likelihood of legally inappropriate uses of force that might undermine strategic successes. This article proposes that U.S. Joint Forces Command develop, manage and sustain a use of deadly force instructor certification program that would ensure joint standards for master trainers from the diverse services on well-defined yet routinely ignored universal truths concerning not only the law, but also the tactical realities surrounding deadly force encounters. America’s “Strategic Corporals” trained to the right legal and tactical standard will more likely win and survive in today’s deadly force encounters.

TRAINING AMERICA'S STRATEGIC CORPORALS

The belief that machines fight wars and people are of secondary importance was exemplified by technological solutions to the ongoing enemy evolutions in the war in Iraq and Afghanistan. The high priests of technology in the Pentagon and industry (and their wholly owned subsidiaries in the media and think tanks) even have the temerity to construct a precisely defined vision of a high tech world in 2025 through the RMA. It justified the past obsession with "revolutionary" precision-guided weapons and all-seeing, all-knowing command and control systems. Today, these same systems have not been able to defeat a third world insurgency. Only thinking leaders and soldiers can do that.

—Franklin C. Spinney, "Pork Barrels and Budgeteers: What Went Wrong with the Quadrennial Defense Reviews?"²

More so than any time in our history, American Soldiers, Sailors, Airmen and Marines are being placed into situations whereby they have to make split-second decisions on whether or not to use deadly force in defense of self and innocent others. Their decisions are often judged in the clear vision of 20-20 hindsight by government, political and media entities that do not understand the tactical realities of a fire fight.

Because our forces have been in near-continuous combat since 2001, America possesses for the first time since WWII a high percentage of the military force that has experienced combat. We now have a new generation of warriors that have performed as well as the much vaunted Greatest Generation of WWII, but we insist on impeding them with pre-9/11 rules and post-shooting analyses.³

While there have been tremendous strides taken to recognize the importance of realistic tactical training and weapons familiarity,⁴ in many ways we are still behaving like a risk-averse, peacetime military when it comes to rules of engagement drafting, implementation and training.

As recently exemplified by the experience of Marine Lance Corporal Justin L. Sharratt, who faced court-martial charges stemming from his decision to use deadly force in Haditha, Iraq on November 19, 2005, American service members are increasingly thrust into situations where they must make use of deadly force decisions more analogous to domestic law enforcement confrontations than traditional force-on-force combat operations. There remains much discord and confusion as to the authority and ability to use deadly force. Much of this confusion is not based on the rules themselves – rules that are, for the most part, rather robust – but rather on how the rules are trained and communicated to the lowest echelons.

The purpose of this paper is to propose that the Department of Defense develop and sustain a use of deadly force instructor certification program that would ensure joint standards for master trainers from diverse services on some universal truths concerning not only the law, but also the tactical realities surrounding deadly force encounters and small arms proficiency. Such training will greatly enhance America's Strategic Corporals⁵ in making the right deadly force decisions across the mission spectrum, thereby increasing the likelihood of killing hostiles and decreasing the likelihood of killing innocent civilians. To ensure uniformity across services – services that increasingly operate together or collocate within the same battle space – U.S. Joint Forces Command is the most logical and relevant command to be the program's proponent.

In Haditha, on November 19, 2005, Lance Corporal Sharratt – a veteran of combat operations in Fallujah – engaged four civilian-dressed military aged males while conducting a house-to-house search just hours after his convoy was hit during a road side improvised explosive device (IED) attack. The end result of an intense and

sometimes improperly focused investigation was an exoneration of Lance Corporal Sharratt after a hearing conducted pursuant to Article 32b of the Uniform Code of Military Justice (UCMJ). The convening authority – then-Lieutenant General James Mattis⁶ – wrote a two-page letter to Lance Corporal Sharratt dismissing the charges. The relevant portions of General Mattis' poignant dismissal letter are set forth as follows:

The experience of combat is difficult to understand intellectually and very difficult to appreciate emotionally. One of our Nation's most articulate Supreme Court Justices, Oliver Wendell Holmes, Jr., served as an Infantryman during the Civil War and described war as an "incommunicable experience."^{7]} He has also noted elsewhere that "detached reflection cannot be demanded in the presence of an uplifted knife."^{8]}

While the charges against Sharratt were eventually dismissed, the reality remains that service members are, indeed, being unnecessarily subjected to detached reflection in the presence of uplifted AK-47s. More importantly, many responsible for training our forces pre-combat, as well as those investigating our warriors post-combat, fail to appreciate the dynamics of a tactical encounter as experienced in close quarters combat (CQC).⁹ In fact, one of the few general officers with considerable CQC experience¹⁰ recently commented that the events of Haditha were the result of placing Marines trained and experienced in conducting traditional Military Operations in Urban Terrain (MOUT) tactics in a CQC environment. In other words, if we use blunt instruments to affect precision surgery, we should not be surprised at the resultant trauma to the body. With little difficulty, via a time-tested law enforcement training methodology, individual warriors can be honed to make more precise decisions under stress.

First, Understand the Law: Self-Defense

One ought never to turn one's back on a threatened danger and try to run away from it. If you do that, you will double the danger. But if you meet it promptly and without flinching, you will reduce the danger by half. Never run away from anything. Never! ¹¹

There is misunderstanding – even amongst otherwise learned judge advocates – concerning the robust legal authority for individual Soldiers, Sailors, Airmen and Marines to use force in self-defense. It is important, therefore, to first comprehend the depth and breadth of the law in this regard, as well as its relevance to military operations.

At a strategic level, the lawful authority, domestically and internationally, for United States forces to use force is rooted in the right of self-defense. By keeping all uses of military power – specifically war and war-like actions – founded in self-defense, America will retain the moral high ground, clearly signal its strategic intentions to potential adversaries, and avoid straying into the morass of commitments not rooted in self-defense. This applies to the individual's right of self-defense as well.

Throughout the mission spectrum, from seemingly benign humanitarian assistance missions to hard fought counterinsurgency operations, most use of force decisions our forces make will be predicated on this right of self-defense. Applying such decisions in the “three block war”¹² environment requires our Strategic Corporals to individually and near-intuitively understand their rights and authorities to use force in self-defense.

In order to appreciate the full depth and breadth of the right of self-defense, it is worth examining its historical roots. Consistently, since at least 60 B.C., laws and customs have recognized individuals' inherent right to reasonably defend themselves

from an attacker threatening to inflict death or serious bodily injury. Historically, the right of self-defense has been viewed not as a statutory or legal right, but as a divine natural right permanently bestowed upon all persons by virtue of existence. Over 2,000 years ago Markus Tullius Cicero wrote:

[t]here does exist therefore, gentlemen, a law which is a law not of the statute-book, but of nature; a law which we possess not by instruction, tradition, or reading, but which we have caught, imbibed, and sucked in at Nature's own breast; a law which comes to us not by education but by constitution, not by training but by intuition—the law, I mean, that should our life have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable.¹³

William Blackstone, the father of English Common law,¹⁴ wrote, “[s]elf defense is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the laws of society.”¹⁵ “The right of having and using arms for self-preservation and defense” is one of the five auxiliary rights people possess to “protect and maintain ‘the three great and primary rights’ personal security, personal liberty, and private property.”¹⁶

English philosopher John Locke observed, “self defense is a part of the law or nature, nor can it be denied the community, even against the king himself”¹⁷ In his treatise on civil government, self-defense is fundamental to the very existence of mankind. Much like one is justified in killing a wild animal if it displayed intent to attack; one is justified in taking the life of another person if that person displayed intent to do harm to you. Locke reasoned:

... one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the common law of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures, that will be sure to destroy him whenever he falls into their power.¹⁸

The Founding Fathers also used English common law as a platform to build the U.S. Constitution. English common law long recognized individual's right to self-defense as a natural and divine right.¹⁹ The drafters were heavily influenced by the works of William Blackstone, and drafted the core of the Constitution to protect life, liberty and property. Self-defense was a part of the right to personal security, as one could not be secure in their safety without the right to defend against those wishing to deprive him of it.²⁰ Mirroring Blackstone's statements, Samuel Adams wrote: "[a]mong the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can."²¹ The Constitution reflects Blackstone's influence in the Bill of Rights, which explicitly protects our rights to life, liberty, and property, and freedom from governmental intrusion.

Even under international legal constructs, it should be noted that customary and statutory international law recognizes the inherent right of self-defense. The application of anticipatory or pre-emptive self-defense and the maxim of a person's inherent right to self-defense were firmly established in the *Caroline* incident. In 1837, the British were fighting a counter-insurgency war along the Niagara River in Canada. The steamer *Caroline* was being used by the insurgents on both the American and British sides of the river. On the evening of December 29, 1837, British combatants crossed onto the American side of the river and destroyed the *Caroline* while it was docked in Schlosser, New York. The Americans protested, but the British responded that they were merely exercising their inherent right of self-defense. American Secretary of State Daniel Webster disagreed.

In response to Lord Ashburton's claim that the British acted in self-defense, Webster declared that for an act to be self-defense, it "must be a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."²² Secondly, to be appropriate, self-defense must be proportional, not "unreasonable or excessive."²³ While never admitting culpability for the Caroline incident, the British apologized to the United States for the incident.²⁴

The Caroline incident is the first recognition of the common law right of self-defense as it relates to international law.²⁵ Lieutenant Commander Dale Stephens wrote:

Lord Ashburton specifically noted the 'ingenious' suggestion by Mr. Webster that the legitimacy of British actions should be assessed by reference to this modified concept of self defense under international law. Thus, the British suddenly found themselves defending their Captain's actions on the basis of a principle narrower than self-preservation. Further, Lord Ashburton accepted the challenge and consistently described his justification of British actions in terms analogous to personal self defense.

The Caroline incident also serves as a strong legal precedent for many of America's pre-emptive military strikes, to include the recent cross-border operations into Pakistan and Syria targeting Al Qaeda. On such fundamental concerns as self-defense, America may enter into short or long-term alliances, but must never submit to the will of the collective international masses when discerning what constitutes a justifiable act of self-defense. This is because collective thought might reflect collective ignorance as evidenced by the restrictions imposed by the United Nations (UN) that have plagued General Bipin Rawat, an Indian officer who commands UN forces in Democratic Republic of Congo:

Under their rules of engagement, Gen Rawat's forces are always denied the advantage of surprise. They must shout verbal warnings and fire shots

in the air before they can engage any rebels. Their operations are not allowed to risk a single civilian casualty.²⁶

One glowing ember of hope in the darkness of such ill-conceived UN-authored rules of engagement (ROE) is that such rules apply to the targeting of forces rather than using force in individual or collective self-defense. Accordingly, there remains strong constitutional, common law and international law support for both collective and individual rights of self-defense. Across the mission spectrum – from humanitarian relief operations to force-on-force conflict – it is abundantly clear that America can justly and lawfully support uses of force in self-defense. This extends to the rules as they apply to the individual Soldier, Sailor, Airmen, or Marine.

Despite mandatory guidance from the Chairman, Joint Chiefs of Staff that “commanders, at all levels, shall ensure that individuals within their respective units understand and are trained on when and how to use force in self-defense”²⁷, the dangerous, and sometimes tragic, reality is that this mandate is not being well-carried out by the services. Many Soldiers, Sailors, Airmen and Marines are not properly trained on threat recognition and appropriate tactical responses to a hostile act or demonstration of hostile intent. This creates not only a heightened risk for friendly forces, but also a greater likelihood of legally inappropriate uses of force that might undermine strategic successes, especially in the counter-insurgency (COIN) fight.

Legal Authorities for Using Deadly Force in Military Operations.

Commanders and individual warriors are always looking for simple, direct, and easily applied ROE that answer their fundamental use of force question, “When should I pull the trigger?” While general guidelines for upper command levels can be set forth in the ROE Annex of an Operations Order, and even more particularized guidance handed

out to subordinate echelons via ROE Cards, the answer to such a question is almost always incident specific and must be based on the split-second judgment of the individual on the scene. In such situations ROE Cards and Escalation of Force (EOF) Cards remain nearly useless (and often needlessly dangerous) as they assume a linear linkage in a non-linear world. Paralleling the problem that critics of effects-based operations have identified – that the “nearly limitless ways that an action might ricochet through an interactively complex or nonlinear system mean that for all practical purposes, the interactions within the system exceed the calculative capacities for any computer to follow, at least in any meaningful way”²⁸ – ROE or EOF cards ignore the fact that deadly force situations are complex and not conducive to “if-then” solutions.

Accordingly, *judgment-based training*, the opposite of the usual *rules-based training* individuals typically receive in this area, is a better way to ensure tactically sound compliance with the ROE. As discussed more fully, below, this can effectively be accomplished by using a combination of situational exercises, briefings, and firearms training focused on elevating the student’s ability to quickly, dispassionately and accurately assess threats and apply the relevant rules of engagement.

There are also recurring misunderstandings by many service members and judge advocates concerning the level and degree of authority needed to engage lawful targets. This misunderstanding and confusion leads to the mistaken belief that the actual status of an individual shot in self-defense must first be ascertained. Too often, warriors are briefed that they must have “PID” (positive identification) before engaging. Such ill-founded beliefs are perpetuated by the repeated use of criminally-focused investigations into what are, in essence, line-of-duty shooting decisions.

There are two²⁹ – sometimes distinct – manners by which a military member can lawfully employ deadly force: (1) subject to a target being declared hostile by competent authority or (2) in response to a demonstrated hostile intent or hostile act (intended to inflict death or serious bodily injury to self or friendly forces).

Against a declared hostile, once PID is established, then there is no legal obligation to detain, capture or otherwise take less intrusive means. By way of example, a Soldier could walk into a barracks room filled with sleeping enemy combatants who have been declared hostile and shoot them. There is no legal obligation to wake them, capture them or make it a “fair” fight. By direct analogy, if a tactical operations center can lawfully drop a 2,000 lb laser-guided bomb on that barracks room (subject to collateral damage and proportionality analysis), then it is axiomatic that a lone Soldier could kill them with his M-4. For some reason, however, when some judge advocates and commanders review these close-in killing situations, they mistakenly analyze them under a self-defense methodology as set forth below.

In matters of individual or unit self-defense, as spelled out in the unclassified portions of the Standing Rules of Engagement (SROE) and Standing Rules for the Use of Force (SRUF) for U.S. Forces³⁰, service members possess an inherent right of self-defense predicated solely on a reasonable response to a demonstrated hostile intent or hostile act (intended to inflict death or serious bodily injury to self or friendly forces). In self-defense situations, PID is irrelevant and proportionality is rarely an issue. Soldiers need to understand that they can use reasonable force to quell such a threat until that threat is over.

Misunderstanding of the rules breeds unnecessary confusion and hesitation amongst the force. This results not only in unnecessary risks for our forces, but also in our young warriors' persistent exposure to criminal liability for the perceived "crime" of killing the enemy.

For years now, nearly every line of duty shooting incident in Iraq has been subject to an often criminally-focused investigation whereby sworn statements are taken and service members are questioned without the benefit of legal counsel, psychologists, or even chaplains. While it is necessary to ensure that service members follow the rules and use force appropriately, the perception and reality is that continually subjecting our forces to the wrong legal standard and improperly-focused investigations inevitably results in hesitation and mistrust. The following October 2007 communiqué from a young Army noncommissioned officer in Iraq highlights this folly:

There is nothing to come of this except making my Soldiers scared to pull the trigger and that's all that this is doing. They see me getting questioned everyday over something as dumb as firing back when fired upon. God only knows what they would be trying to do if we accidentally killed one [of] the 'wrong' people.³¹

Another noncommissioned officer – a sniper – was recently court-martialed over the killing of three Iraqis suspected, among other things, of emplacing IEDs. While he and his team possessed the legal authority to kill the targeted individuals, without understanding their inherent authority, they mistakenly believed they had to plant "evidence" on bodies after what were in reality legitimate kills. This perception results directly from (1) failing to properly educate our forces on the ample legal authority extant for making judgment-based shooting decisions and (2) conducting criminally-focused investigations on Soldiers' decisions to use force in combat. The sniper was acquitted of the murder charges, but convicted of obstruction of justice for planting evidence.³²

The frustration with the tactical – legal – policy interface is highlighted by the following account from an infantry battalion commander recently returned from Iraq:

My battalion along with other elements of my BCT spent six months training up for our OIF rotation. We completed the mandatory training events to include a JRTC rotation preparing us well for “full spectrum” kinetic and non-kinetic operations at the tactical and operational levels. When we would have an escalation of force that involved any shots fired, it was a CCIR to my higher headquarters. Initially the BCT SJA would review each incident and recommend that the BCT Commander issue letters of concern to Soldiers for any and all EOF's [escalations of force]. This practice confused and frustrated my Soldiers. These young men were working in difficult, challenging, and potentially deadly situations. In my opinion it did not require a legal review for every EOF that had warning shots fired. In every case that I reviewed regarding an EOF they were doing the right thing with all the right intentions, and doing what they needed to do to protect themselves and others in the unit. I was eventually able to get through to the BCT Commander that the SJA was applying a CYA, one size fits all mentality from the comfort of his air conditioned office. These letters of concern from the BCT Commander made my Soldiers and my unit more vulnerable to frustration and hesitation in a dangerous game in which you can't just stick in a green key and do it over.³³

Sniper teams in Iraq or Afghanistan performing counter IED missions may engage persons conducting overt hostile acts (such as actively emplacing an IED in a roadway surface) or persons demonstrating hostile intent (a lookout using a cell phone while communicating the approach of coalition forces), both clear examples of using force in self-defense. That same team may also be employed to engage a designated hostile force or enemy combatant, and may engage without regard as to whether that hostile force presents an imminent threat. This concept extends to fleeing subjects previously identified as hostile by adjacent friendly forces.

Some commanders have been reluctant to authorize the shooting of insurgents clearly emplacing IEDs in roadways late at night. They have prevented the targeting of insurgents conducting probes of friendly positions; and, have also failed to authorize the

kinetic engagement of clearly identified hostile vehicles speeding away from a mortar “point of origin” as they “were not a threat at the time of acquisition.”³⁴

This last point is important to clarify; some less tactically aware judge advocates and commanders have opined that “fleeing hostile actors can’t be engaged.” To so state ignores both the tactical concept of pursuit as well as the hard reality that such a fleeing subject continues to be a threat. To put it even more bluntly: nothing in the law allows a hostile actor to fire a weapon at coalition forces, then drop the weapon and flee without fear of being targeted and killed. Even in civilian law enforcement settings, such fleeing hostile actors are well-recognized as a continuing threat that may be engaged.³⁵

Some well-intentioned but ill-informed judge advocates have recently opined that “one of the most effective ways to drive home the importance of EOF to soldiers [such as exercising fire discipline] at traffic control points and on convoys is by giving awards to soldiers who DO NOT SHOOT when the ROE may have allowed them to, thereby saving innocent lives.”³⁶ The intent of this guidance – to save innocent civilian lives – is admirable, but the end result of incorrectly trying to apply the strategic concept of “minimum force” to a tactical situation is to *unnecessarily* expose military forces to imminent threat of death or serious bodily injury. Recognizing that missions are often ambiguous and dangerous enough, neither good tactics nor the law require one surrender the right and responsibility to exercise individual and collective self-defense.

As recently stated by Major General Gary L. Harrell,³⁷ USA (Ret.), former Deputy Commanding General, US Army Special Operations Command, “The only tactical solution when confronted with an imminent threat of death or serious bodily injury is to immediately respond with overwhelming force and continue to apply that force until the

threat is over.” Too often, commanders and judge advocates with little or no true CQC experience, attempt to substitute their own notions of reasonableness for the warrior on the scene. The Supreme Court of the United States³⁸ has consistently recognized this as folly for our domestic police forces,

... such reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight ... the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation in circumstances that are tense, uncertain, and rapidly evolving.

In situations that often mirror those encountered by civilian law enforcement, soldiers must be able make split-second deadly force decisions. Despite this tactical reality, they often are exposed to unnecessary and ill-advised legal and operational scrutiny. No commander wakes up in the morning thinking “How can I throw my Soldiers under the bus today?” In fact, there are multiple EOF cases in Iraq that do not result in judicial or nonjudicial punishment. The ground truth remains, however, that we can do a much better job in preparing our forces to make better decisions both pre-shooting (i.e., target selection) and post-shooting (i.e., articulating their actions during the travails of an escalation of force investigation). Simultaneously, we can better educate commanders, judge advocates and investigators involved in the post-shooting environment.

Meeting the Training Challenge: Judgment-based Engagement Training (JET) Seminar

In 2000, a group of judge advocates and tactical weapons instructors collaborated to develop the Rules of Engagement (ROE)/Rules for Use of Force (RUF) Tactical Training Seminar.³⁹ Since then, this course has been taught using a mobile training team concept to thousands of students in organizations ranging from Special

Operations Command Central to 1st Armored Training Brigade to Naval Expeditionary Combat Command, and to the Defense Institute for International Legal Studies. It has, over time, been renamed the JET Seminar.⁴⁰

The program of instruction effectively trains military members, commanders, and their judge advocates concerning lawful and tactically sound application of the use of deadly force. The judgment-based training curriculum is the opposite of the usual rules-based training and offers realistic situational and firearms instruction beyond that rendered by traditional lectures, lane exercises, and marksmanship range training done in isolation from one another. Further, such judgment-based training in no way degrades traditional force-on-force combat skills, but rather enhances them. This training is unique, innovative, and essential for the missions faced in the post 9/11 world.

These seminars – generally two to three days in duration – provide a detailed overview on the law and the tactical dynamics of deadly force encounters: action v. reaction, Tache-Psyche Effect (the psycho-physiological reactions of humans under high stress tactical environments), and wound ballistics. Expert instructors from various military departments, law enforcement agencies, civilian experts, and legal instructors, provide the classroom instruction. Later, students viscerally experience the phenomena and issues discussed in the classroom by using diverse situational training exercises and devices, to include: Engagement Skills Trainer, Firearms Training System, Simunitions FX⁴¹, and live-fire judgment-based targets on the range.

Such force-on-force training creates a level of “stress inoculation” against some of the more deadly aspects of fear and stress induced physiological and psychological

effects. The program provides the operators with essential information regarding the use of force along with “holistic” knowledge and practical applications. Throughout both the dynamic and interactive training regimens, students are forced to rely upon near-instantaneous judgment – judgment that can only be gained by exposure to a variety of complex situations requiring immediate detection, decision, and reaction. This increased understanding cultivates judgment through the fluid integration of decision-making and tactical concerns. Very simply, confidence in use of force authority and skill leads to operator competence and increases the likelihood of lawful CQC engagements.

The JET Seminar is not a lone wolf in its efforts to transform military training from a rules-based to a judgment-based methodology. Author and retired military officer Donald Vandergriff cogently points out in the following passages some of the problems, as well as innovative solutions, to this problem:

As a result, recent leader and soldier training do not encourage thinking and decision making. In fact, it often discourages it. Although the best instructors—and especially those recently returned from combat—take great efforts to explain to their soldiers why things were done a certain way, the program itself stressed only the mechanical application of tasks. Worse, the atmosphere established during some courses emphasized “total control.” In some units, particularly basic training units extended beyond the point of usefulness, that atmosphere sometimes remained nearly until graduation. Drill sergeants yelled, while instructors at leader courses assumed the “know and be all” stance that prevented anyone from questioning their authority. Cadets, candidates, and junior officers, as well as soldiers, asked few questions, and infractions were answered by mass punishment, while education techniques are rote and boring. The process for training mobilized Guardsmen and Reservists was even more obsolete and narrow. Guardsmen and Reservists, many of whom had active component experience, were treated as if they had never trained their units, and training at the mobilization centers has continued to be lock step in compliance with First Army’s, FORSCOM, HQDA and CENTCOM training requirements for theater. Many Guardsmen and Reservists have stated “I’ll deploy again, but I never want to go through another mobilization center run by First Army.”⁴²

Vandergriff goes on to note that “Young leaders and soldiers are not forced to work things out for themselves or to learn to be individually responsible. Not understanding why tasks are performed a certain way, they often fail to adapt properly to changed circumstances. Fortunately, thousands of leaders at the officer, NCO, and retired levels in the Army have recognized the downfalls of today’s training and education doctrine and are moving from the bottom up to fix it, better preparing tomorrow’s Army for the changing face of war.”⁴³ Perhaps no other organization in the military embodies this more than the Army’s Asymmetric Warfare Group (AWG).⁴⁴ AWG teaches the Combat Applications Training Course (CATC) utilizing a philosophy that deals with a method to instruct and develop mastery of any given subject. Its premise is that soldiers can apply principles to understand the how and why of training. At the center of CATC is the use of problem solving in order to teach a task. Task-oriented training works well imparting knowledge concerning skills with set procedures and static end states like starting an aircraft or conducting pre-jump inspection of a paratrooper. This type of “check the block” training, while perhaps comforting to metrics-centric thinkers, does little to prepare individuals to make decisions in dynamic, tense situations.

A Proposed Way Ahead: Developing Master Use of Force Trainers

While the JET Seminar has been validated⁴⁵ from a requirement and efficiency perspective, the reality remains that its current mobile training team concept cannot sustain the through-put required to train the force as a whole. Accordingly, a method for training master trainers within the joint force on the correct legal and tactical standards must be rapidly fielded. This would ensure a common understanding of the rules of

force – essential in the common operating environment continually faced on today's battlefield. The Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, an interagency law enforcement training organization for more than 80 Federal agencies, might serve as a model for this training.

FLETC's advanced two-week course, entitled Use of Force Instructor Training Program (UOFITP), is designed for those who advise law enforcement officers or agents, revise or develop use of force policy, conduct use of force training, and evaluate use of force incidents. The course not only shows students how to appropriately use force, but also demonstrates the appropriate methodology in teaching use of force and evaluating use of force incidents.

Very similar to the CATC process so successfully utilized by AWG, the student learns via hands-on participation and demonstration about use of force applications, documentation, court testimony, expert witness, safety issues, scenario development, non-lethal training ammunition use, logistical support, performance testing, planning, design and the proper execution of interactive use of force training. The students are then expected to demonstrate their proficiency in use of force principles and case law by articulating the facts that justify a particular use of force. For successful completion, students are also expected to teach a 30-minute class and answer questions during an oral board.

Using the FLETC model, the Department of Defense should establish a Use of Force Master Trainer Center of Excellence (COE) where tactical trainers from the services would be *certified* on legally and tactically sound judgment-based training methodologies. In addition to tactical trainers, the course would also instruct judge

advocates and investigators responsible for assessing the reasonableness of service members' line-of-duty use of force and improve the abilities of those who draft ROE. Eventually, only certified investigators would be empowered to conduct such inquiries. This would ensure that Soldiers, Sailors, Airmen and Marines are not only held to the proper legal standards, but that they will be judged not in the clear vision of 20/20 hindsight, but rather upon how a reasonable person would act under circumstances that are often "tense, uncertain, and rapidly evolving."⁴⁶

Logically, U.S. Joint Forces Command (USJFCOM) should be the sponsoring command for such a Center. Exercising its responsibilities for Joint Concept Development and Joint Training, USJFCOM should lead, train, and coordinate this effort ensuring the uniformity, compliance, and integrity of the program. To initially staff the program, USJFCOM need only draw upon the already assembled JET Seminar cadre of trainers. The US Air Force Expeditionary Center, Ft Dix, New Jersey, already successfully uses this model several times a year by inviting JET Seminar cadre to teach ROE/RUF classes to key and essential leaders, judge advocates and paralegals undergoing predeployment training. Already extant and operational pre-deployment training venues, like the Expeditionary Center, are readymade for hosting a Use of Force Master Trainer COE.

By instituting judgment-based engagement training at each of the services' pre-deployment training sites, USJFCOM could ensure tens of thousands of service members are properly trained prior to deploying this nation's treasure into harm's way. If USJFCOM chooses to expand, or offer the course in a Mobile Training Team (MTT) construct, it could reach out to sources like AWG and the Expeditionary Center to round

out MTTs. This would offer the capability to train war fighters at their home station or in theater.

Lastly, USJFCOM should look to the future and develop realistic, stress-inducing combat simulators for individual infantrymen. The state of the art in simulators currently allows pilots to move from simulator to real-life cockpit and successfully fly missions. There is no reason why Americans fighting in the streets of a future Baghdad – more likely to make strategic policy- altering decisions – can't be provided such a realistic training modality.

To ignore the use of force training mandate in the SROE is dangerous. To substitute overly restrictive ROE and ill-focused investigations in lieu of this mandate constitutes a systemic dereliction of duty. We owe it to our warriors to train them to the right legal and tactical standards. In doing so, we will better help them win and survive in today's deadly force encounters. Moreover, it will help America's "Strategic Corporals" reach the goals as outlined in current strategic doctrine.

Endnotes

¹ Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, Standing Rules of Engagement (SROE) and Standing Rules for the Use of Force (SRUF) for U.S. Forces, (13June2005).

² Franklin C. Spinney, "Pork Barrels and Budgeteers: What Went Wrong with the Quadrennial Defense Reviews?," *Strategic Review* (Fall 1997): 29.

³ David G. Bolgiano, *Combat Self-Defense: Saving America's Warriors from Risk-averse Commanders and their Lawyers* (Severna Park: Little White Wolf Books, 2007)

⁴ E.g., the tactics techniques and procedures shared with the deployed force by the Army's Asymmetric Warfare Group's mobile training teams, as well as recent changes to Basic Military Training (BMT) instituted by the Army Training and Doctrine Command (TRADOC)

⁵ Donald Vandergriff, *Military Recruiting: Finding and Preparing Future Soldiers*, (Westport: Praeger Security International, 2008), Chapter 6, defines "A Strategic Corporal or lieutenant is a

Soldier that possesses technical mastery in the skill of arms while being aware that his judgment, decision-making and action can all have strategic and political consequences that can affect the outcome of a given mission and the reputation of his country.”

⁶ General James N. Mattis, USMC, currently serves as Supreme Allied Commander Transformation and Commander, U.S. Joint Forces Command.

⁷ From Holmes speech, “The Soldier’s Faith,” delivered on Memorial Day, May 30, 1895 to the graduating class of Harvard University.

⁸ *Brown v. United States*, 256 U.S. 335, 343 (1921)

⁹ Robert G. Delaney, “Army Transformation: The Human Condition of Soldiering,” *Military Review* (May -June 2004): 37, citing U.S. Army Regimental Training Circular 350-1-2, Close Quarters Combat Program of Instruction.

¹⁰ Major General Eldon Bargewell, USA (Ret.), in an interview with the author, August 2007. General Bargewell began his 40-year Army career as a Special Forces Soldier in Vietnam, where he was awarded, amongst other awards and decorations, the Distinguished Service Cross. Throughout his career, he served at various levels of command, to include command of 1st Special Forces Operational Detachment – Delta (Delta Force). He has also been awarded the Purple Heart on 13 occasions.

¹¹ Oracle Homeland Security Solutions, “Leveraging Information Technology to Secure America” (2003), quoting Sir Winston Churchill, http://www.oracle.com/industries/government/Oracle_in_Homeland_Security.pdf.

¹² Charles C. Krulak, “The Strategic Corporal: Leadership in the Three Block War,” *Marines Magazine* (January 1999).

¹³ Marcus Tullius Cicero, *Defense Speeches, On Behalf of Milo, 60 BCE*, trans. D. H. Berry, (London: Oxford University Press, 2000).

¹⁴ Charles L. Cantrell, “The Right to Bear Arms: A Reply,” 53 Wis. B. Bull. 21-26 (Oct. 1980).

¹⁵ 3 Blackstone, William, *Commentaries on the Laws of England*, at 141 (1766).

¹⁶ *Ibid.*

¹⁷ Locke, John, *Two Treatises of Government*, “The State of War,” §16 (1689).

¹⁸ *Ibid.*

¹⁹ 1 Hawkins, *Pleas of the Crown*, Ch. 28, §14 (7th ed. 1795).

²⁰ 3 Blackstone, William, *Commentaries on the Laws of England*, at 141 (1766).

²¹ Constitution Society, “Samuel Adams, The Rights of Colonists, November 20, 1772,” http://www.constitution.org/bcp/right_col.htm

²² Letter from Daniel Webster, Secretary of State, to Henry Fox, British Minister in Washington, April 24, 1841, reprinted in 2 John Bassett Moore, *A Digest of International Law* 409, 412 (1906).

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Dale Stephens, "Rules of Engagement and the Concept of Unit Self Defense," 45 *NAVAL L. REV.* 126, 134 (1998).

²⁶ David Blair, "UN commander says hands are tied in Congo," *The Daily Telegraph*, London, November 17, 2008.

²⁷ CJCSI 3121.01B (13June2005)

²⁸ Paul K. Van Riper, "EBO There Was No Baby in the Bathwater," *Joint Force Quarterly*, Issue 52, 1st Quarter 2009.

²⁹ There are others, such as defense of certain classified facilities or property, but the most relevant and prevalent are discussed here.

³⁰ CJCSI 3121.01B (13June2005)

³¹ Undisclosed noncommissioned officer (NCO) e-mail to the author, October 12, 2007. The NCO's duties included providing squad-level escort duties to civilian members of diverse inter-agency task forces in the Iraqi theater.

³² "Panel clears Army sniper of murder charges in Iraq," *Seattle Times*, November 9, 2007. "The court-martial panel cleared Staff Sgt. Michael Hensley of three counts of murder and also of charges that he made false statements to investigators. He was found guilty of placing an AK-47 assault rifle on a man killed May 11 by a fellow soldier. Hensley also was convicted on two counts of insubordination for walking away from and cursing an officer."

³³ Colonel Ben Corell, USA, US Army War College Class of 2009, Seminar 4, interview by author, 15 Oct 2008.

³⁴ From the author's duties, observations and readings concerning diverse classified and unclassified situation reports from both Iraq and Afghanistan from March 2007 until June 2008. At the time, the author was working as Deputy General Counsel, Joint IED Defeat Organization, Counter IED Operational Integration Center (JIEDDO-COIC).

³⁵ E.g., Chicago Police Department General Order 02-08-03, Section III stating in pertinent part that "[an officer may use deadly force against an escaping subject if the officer reasonably believes]:

a. has committed or has attempted to commit a forcible felony involves the infliction, threatened infliction, or threatened use of physical force likely to cause death or great bodily harm or;

- b. is attempting to escape by use of a deadly weapon or;
- c. otherwise indicates that he or she will endanger human life or inflict great bodily harm unless arrested without delay.”

³⁶ United States Army’s Center for Law and Military Operations (CLAMO) e-mail message to deployed legal offices, January 16, 2008.

³⁷ Major General Harrell made these comments in 2006 in a video-taped interview for the Navy’s Center for Security Forces as it was developing its own Judgment-based Engagement Training for its Riverine Forces. General Harrell formerly commanded Special Operations Command Central during OEF and OIF, 1st Special Forces Operational Detachment-Delta (Delta Force), and at the Company, Troop, and Squadron level commands at that unit.

³⁸ *Graham v. Connor*, 490 U.S. 386 (1989)

³⁹ This Seminar concept derived from groundbreaking work initiated by rules of engagement and use of force experts W. Hays Parks (DoD) and John C. Hall (FBI).

⁴⁰ JET is an acronym first developed by Captain Mark Kohart, USN and Commander Thomas Mowell, USN at the Navy Center for Security Forces, Little Creek, Virginia after they successfully integrated the ROE/RUF Tactical Training Seminar concept into their program of instruction (POI) for deploying naval forces performing in-lieu-of (ILO) mission in Iraq and Afghanistan.

⁴¹ Simunitions FX is the trade name of a popular non-lethal marking round used extensively in law enforcement training.

⁴² Vandergriff, *Military Recruiting: Finding and Preparing Future Soldiers*, citing an interview with Major Andy Dzienwenski, Army National Guard Bureau, April 5, 2008.

⁴³ Vandergriff, *Military Recruiting: Finding and Preparing Future Soldiers*.

⁴⁴ Ibid., describing the Asymmetric Warfare Group (AWG) located at Fort Meade, MD as originally being founded in 2005 as part of the IED Task Force. It was formally chartered as AWG by the Vice Chief of Staff of the Army in 2006. It takes the latest lessons learned in theaters of operations (war) and helps commanders and staffs translate these lessons into tactics, techniques, and procedures (TTPs). It has just recently begun teaching the CATC course, which has grown popular within a few short months with units and courses throughout the Army.

⁴⁵ Both Army TRADOC and Navy Expeditionary Combat Command (NECC) have incorporated many of the ROE/RUF Tactical Training Seminar concepts into their Escalation of Force POI. Moreover, JIEDDO-COIC funded four “proof of concept” iterations with the Army, Navy, Air Force and Marines, the results of which were overwhelmingly successful.

⁴⁶ *Graham v. Connor*, 490 U.S. 386 (1989).

